Comments to Subcommittee Reports for the February 28 Meeting

To: Subcommittee on Unauthorized Practice of Law and Artificial Intelligence
From: Prof. Kevin Mohr
Date: February 25, 2019
Re: ATILS - UPL/AI Subcommittee - Comments

I have a few comments on the wide-ranging and insightful memo submitted by the AI/UPL subcommittee (Dan Rubins & Joshua Walker) regarding standards and certification for legal technology providers.

1. On page 2, bottom, the authors identify two questions to be addressed in the memo: (i) What standards should legal tech providers (LTP) meet to have their tech licensed or excluded from UPL from UPL claims; and (ii) what should the certification process be?

a. I wonder if a third question might be posed: Should there be a "re-certification" process in the event the AI technology is materially changed as a result of its use and received feedback? This might not be a pressing question as the technology might have already been put through extensive trials before the LTP has even applied for certification. Moreover, I'm not sure to what extent we might expect the product, once certified, to be changed/improved as opposed to a new product being developed and offered in its place (in which case it would have to go through an initial certification process).

b. I ask because I'm not certain what's contemplated regarding the stage of development of the AI product/service. At the time of certification, would the product/service be more in the nature of a proto-type, a fully-developed market-ready product, or something in between? In patent law, a patent applicant is required to disclose the "best method" of making the invention, process, etc., but the actual manufacturing process will often depart significantly from the "best method" once offered to the public at market scale.

c. I realize lawyers are not subject to "re-licensing," at least not unless they have been disciplined and given the burden to demonstrate their fitness to practice law. However, at least at first -- before AI legal technology is accepted as a suitable alternative for the provision of legal services, allowance for some kind of re-certification process might be warranted. I don't think it would impose any more barriers to entry; it would simply provide an additional assurance that the market is being monitored. Perhaps the FDA process could provide some insight in this area.

2. At pages 4-7, there is an excellent overview of the confidentiality issues surrounding a client's submission of information and the LTP's duty to protect it.

a. Given California's strict view of confidentiality, with only a single exception for life-threatening criminal activity (Bus. & Prof. C. § 6068(e) & CRPC 1.6(b)), I would probably favor the strongest protection available, i.e., the standards of the Legal Cloud Computing Association (LCCA -- not to be confused with the Lionel Collectors Club of America though I suppose they can be protective of their prerogatives) or the Int'l Organization for Standardization (LSO). See page 5.

b. On page 6, there is a discussion regarding end-to-end encryption, which we were informed at the last meeting can be very expensive. To what extent would use of such encryption increase the cost of the services being provided, with the possible result that it would discourage use of it? Also, to what extent could one weak link (I'm thinking of Australia and its recent passage of "back-door" legislation) affect the integrity of the system? I don't think these are deal breakers; I'm thinking more in terms of what kind of disclosures would have to be made to the AI product/service users. The memo touches on this on page 6 under "Recommendation" regarding the possibility that a third party might access the data (LTP must "clearly disclose"). But I think we should have a discussion on the extent of disclosure necessary to obtain a client's informed consent to using the product/service.

c. Do we know the extent to which Amazon, Google and Microsoft comply with LCCA or LSO in operating their cloud services?

d. Regarding "Availability and Disaster Recovery" on page 7, another issue is the extent to which the client will be able to retrieve any information submitted and advice provided should the LTP go under. It's not just the LTP's ability to retrieve the information, but also the client's ability to get access to his or her "file."

3. I don't think it is an issue that requires much attention, but I think we should at least recognize that an AI product/service would not just be used as an alternative to traditional legal services provided by a lawyer but also as a "check" on those lawyer-provided services. For example, I've retained a lawyer and am faced with an important decision in the matter. My lawyer has recommended a course of conduct. I might want to pay a bit more to get a second opinion. Nothing prevents me from getting a second opinion from a live lawyer (CRPC 4.2, the "no-contact" rule, applies only to lawyers who are representing a client in the same matter in which the person seeks a second opinion), so nothing should prevent me from seeking the AI product/service's opinion.

4. Regarding the review process, to what extent can it be made a "blind" process, where the reviewers do not know the identity of the LTP?

a. From what pool would the reviewers be taken? Employees or managers of other LTP? Lawyers who represent LTPs? Employees of the State Bar? State Bar contractors?

b. I am concerned about possible conflicts that could result if the process is not blind, but I'm not sure the extent to which the process could be blind, particularly at the beginning when there might not be an overabundance of LTPs in a particular area.

I realize that many of the issues I have raised are somewhat picky. l very much enjoyed reading the memo and appreciate the time and thought that went into it. I look forward to discussing these issues further during our meeting this Thursday. Thank you.